IN THE

Supreme Court of the United States

October Term, 1962

No. 140

NATHAN WILLNER

Petitioner-Appellant,

vs.

COMMITTEE ON CHARACTER AND FITNESS, APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT,

Respondent-Appellee.

BRIEF OF PETITIONER-APPELLANT

HENRY WALDMAN,
Attorney for Appellant.

HENRY WALDMAN,
LESTER J. WALDMAN,
of Counsel.

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Preliminary Statement

The petitioner-appellant, Nathan Willner, pursuant to permission to appeal by virtue of the issuance by this Court of its Writ of Certiorari, directed to the Court of Appeals of the State of New York, has appealed from the final order or remittitur of the said Court of Appeals, as well as from the amended remittitur of said Court, which denied said Willner's application for admission to the Bar of the State of New York.

The order of the Court of Appeals was without opinion. Willner then moved in the Court of Appeals for amendment of its final order or remittitur to the effect that he had raised the claim that his rights under the Fifth and Four-

teenth Amendments of the Constitution of the United States had been violated.

The motion was granted, and the remittitur amended, so as to read:

> "Upon the appeal herein, there was presented and necessarily passed upon the question under the Constitution of the United States, viz: Appellant contended that he was denied due process of law in violation of his constitutional rights under the Fifth and Fourteenth Amendments of the Constitution. The Court of Appeals held that appellant was not denied due process in violation of such constitutional rights." (Tr. f. 34)

Willner then moved before this Court for the issuance of its Writ of Certiorari, directed to the said Court of Appeals. His petition was granted and the Writ issued (Tr. f. 37).

The respondent-appellee appeared by the Attorney General of the State of New York as its attorney, and filed a brief in opposition to Willner's petition for Certiorari. After the grant of certiorari, disputes arose between counsel with respect to what the printed Transcript of Record should contain. Willner had applied for admission to the Bar immediately after he passed the bar examination—about a quarter of a century ago. The denial of admission was followed by renewals, which were invariably denied. Respondent filed a demand that its 96 items "Amended Designation", be made the record. It finally agreed to waive the printing of that mass of material. At the same time, it made a "Cross Motion to Dismiss"—the complaint—that is to vacate the Writ of Certiorari. The motion was denied. The way is now cleared for the disposition of the proceeding on its merits.

The Facts

The facts are fully related by Willner in his petition to the Appellate Division of the Supreme Court of New York, which initiated this proceeding, and is printed in full in the Transcript of Record, headed: "PETITION TO FILE APPLICATION FOR ADMISSION TO THE BAR" (pp. 2-12 incl., fols. 1-14 incl.), and requires no repetition.

Argument

Willner was denied admission to the Bar in 1937, solely on the report of the Committee that it was not "satisfied and cannot certify that the applicant possesses the character and general fitness, requisite for an attorney and counselor at law, as provided by Section 88 of the Judiciary Law", without stating the facts and reasons upon which it based its recommendation; since then all subsequent applications and proceedings were similarly treated. There has never been even a one sentence memorandum. To this day he does not know the reason or reasons for branding him unfit to be a member of the Bar.

In our petition for Certiorari, we quoted from Mr. Justice Harlan's opinion in *Hurley* v. *Cohen*, 326 U. S. p. 117, that "a state may not arbitrarily refuse a person permission to practice law." We deem this the promulgation of a new policy by the Court, and now the supreme law of the land. Heretofore, our research discloses, the Court refused to take jurisdiction, on the ground that Bar membership was exclusively the business of the state and not subject to the interference of the Federal Government. However, in the *Hurley* case (*supra*) and in *Koenigsberg* v. *State Bar of California*, 253 U. S. 253 and *Schwarer* v. *Board of Law Examiners*, 353 U. S. 232, the Court assumed jurisdiction, even to the extent of delving into the merits of each case.

We assume that the Court, in granting certiorari, did so on one or two grounds, or on both. One is the ground that the Committee acted arbitrarily in reporting that Willner was not fit to be admitted to the Bar, because of lack of good character; the second is that he was entitled to be confronted by the lawyers, Wieder and Dempsey, whose complaints and charges, the Committee had evidently taken very seriously, and upon which it apparently had based its determination of lack of good character.

Our argument will, therefore, be limited to those two issues.

I.

A state may not arbitrarily refuse a person permission to practice law.

The action of the Committee in denying Willner admission to the Bar, was so without cause or reason as to merit the label "arbitrary." Willner had spent four years in the School of Commerce of New York University and was awarded the degree of Bachelor of Commercial Science, then four years in the Law School of New York University which awarded him the degrees of Bachelor of Laws and Master of Laws. He passed the Bar examination; was a member in good standing of the profession of Certified Public Accountants, was married, living with his wife and two children. The denial of admission, without vouching a reason indicates very clearly that the New York courts deem admission and membership in the Bar a privilege, pure and simple, granted by the Sovereign which it has the right and power to deny or to rescind, at its pleasure.

Bar Membership, is a Right, Not a Privilege

Neither the courts nor the citizens nor the business community can function adequately without lawyers. Thus, the state invites all persons with the proper academic

training, to engage in the study of law, and impliedly promises and agrees that one who so engages in the study of law for the prescribed length of time; has successfully passed the required Bar examination and is of good character and fitness, will be licensed by the state to practice law, as his profession. Since preparation for the Bar consumes time, labor, tuition fees and incidental expenses, it is an asset—not tangible, it is true, but property in the real sense of the word. An application for admission to the Bar is a judicial special proceeding, is no wise different from any other proceeding. The applicant is the petitioner and he is required to prove two issues, his knowledge of law and his good character, his law knowledge is established by the certificate issued by the Board of Law Examiners, and his character and fitness by the report of the Committee on Character and Fitness to the Appellate Division. Where, as here, the decision is adverse, the asset is made worthless.

What is good character? As pointed out by Mr. Justice Black, the words are ambiguous. Quoting from his opinion in the *Koenigsberger* case (*supra*):

> "The term 'good moral character' has been long used as a qualification for membership in the Bar, and has served as a useful service in this respect. However, the term itself is unusually ambiguous. It can be defined in an almost unlimited number of ways, for any definition will necessarily reflect the attitudes, experiences and prejudices of the definer. Such a vague qualification, which is easily adapted to the personal views and predilictions can be a dangerous instrument for arbitrary discriminatory denial of the right to practice law."

Willner's character and fitness were determined by three persons, Messrs. Stroock, O'Connor and Ellison. Their decision was questionably based on the *ex parte* charges made by the lawyers, Wiedner and Dempsey. Can there be any doubt that Willner was "arbitrarily" denied permission to practice law?

II.

The right of one accused to be confronted by his accusers, have them sworn, and subject them to cross-examination, in a formal trial or hearing, conducted in accord with common law rules of evidence and court procedure, is so elemental, as not to require citation of authority.

The right of confrontation is a basic right of every person under an accusation, civil or criminal. An habitual criminal, accused of the commission of an atrocious crime may not be denied the right to confront the witnesses against him. This is a right recognized and accepted even in barbarous tribal society.

The right to confrontation and cross-examination was dramatically defined by President Dwight D. Eisenhower in a public address by these words:

> "I was raised in a little town most of you have never heard * * * called Abiline, Kansas. Now that town had a code and I was raised as a boy to prize that code. It was: Meet anyone face to face with whom you disagree * * * in this country, if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow. He cannot assassinate your character from behind * * *."

The real reason for the right of confrontation is precisely that. No man should be assassinated, in person or in his good name, from behind.

CONCLUSION

The appellant was entitled to admission when he first applied. He is entitled to admission now. The order appealed from should be reversed and his admission directed forthwith.

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